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NOTE AND COMMENT

EPITHETICAL JURISPRUDENCE AND THE ANNEXATION OF FIXTURES.—If we begin with all the facts of a controversy and proceed inductively to determine the rights of the parties litigant, we thus arrive at a jurisprudence of rights, whereas, if we reason deductively from a rule, a definition, or a maxim of law to its application in the facts of our case, we can at best attain only a jurisprudence of rules, which has been so aptly characterized as an epithetical jurisprudence. The subject of fixtures is one in which we have great difficulty in applying the inductive method because the courts have been slower in approaching the subject scientifically in this field of the law than in others.

In the recent case of *Hanson* v. *Voss*, (Minn., Dec. 12, 1919), 175 N. W. 113, the court decides that "if the holder of a ground lease erects an apartment building and installs a gas range and a door-bed in each flat and thereafter forfeits the lease, these articles will pass as fixtures to the owner of the realty, if no rights of a third party are infringed and there is no agreement to the contrary." The law of the case is well stated in the syllabus, and is in accord with the weight of authority, and the opinion has the least possible

discussion of definition of fixtures and of annexation. It would seem that this court has done its best to escape from the older mechanical reasoning and comes out right because it does not proceed deductively from a definition to its application in the particular instance, but by the inductive approach to the rights of the parties on the basis of all the facts. The court says, "the manner of annexation is not decisive but only one of the several facts to be taken into account." This is in refreshing contrast to the earlier cases with their labored grammatical interpretations of the word "annexation." The historical route over which the courts have traveled to reach this rational law is perhaps worth retracing.

In an *Anonymous Case,* Y. B., 21 Hen. VII, 26, pl. 4, (1506), a furnace fixed to the freehold descended to the heir. In *Herlakenden's Case,* 4 Co. 62a, 63b, (1589), wainscoting nailed to the wall went to the heir. In this case the court said, "be it annexed to the house by the lessor or lessee it is parcel of the house." In *Squier* v. *Mayer,* Freem. C.C. 249, (1701), it was decided that a furnace fixed to the freehold and hangings nailed to the wall went to the executor. The reason for these contradictory decisions is easy to see. During the sixteenth and seventeenth centuries, in all questions of property law, the concept of seisin is uppermost in the minds of the courts. Now it is evident that if there is affixing of the material of the chattel to the realty, either by accession or by annexation, the holder of the realty is seised of the fixture. As the mind of the court is thus fixed on the annexation, the intention of the party who annexes is ignored. Indeed, in the *dictum* in *Herlakenden's Case, supra,* the court said that the intention of the lessor or lessee had nothing to do with the decision. It is a matter of some surprise that the courts did not avail themselves of the precedent in Roman law in regard to "immovables by destination," which had existed since the time of Labeo (see citation given later). Bracton apparently followed the classic Roman law in this. He says *horreum frumentarium novum, * * * in praedio Semphronii positum, non erit Semphronii* (lib. 2, c. 2, Section 4, fol. 10). Bracton is here talking of accession and not of annexation, to be sure, but the crib destined for storing grain is described as movable because of this destination and not as an immovable, although it is firmly affixed to the soil of Sempronius. The courts of this period were certainly well versed in the Roman law, as we know from Lord Holt's celebrated excursus on bailments in the case of *Coggs* v. *Bernard,* 2 Ld. Raymond, 909 (1701). Sir Nathan Wright, who presided over the chancery court and gave the opinion in *Squier* v. *Mayer,* was a contemporary of Lord Holt, but the Lord Keeper is apparently blinded here by the concept of seisin, so that he fails to see the possibility of help from the Roman source. The common law concept of seisin seems to have the same effect on him that it had on Lord Holt in *Heydon* v. *Heydon,* 1 Salk. 392, (1693), where Holt decides that partners are seised as joint tenants, and ignores the holding as tenants in partnership, just as here the Lord Keeper sees the annexation but misses the evidences of intent. The only reason that the court in *Squier* v. *Mayer* reaches a conclusion contrary to that of the *Anonymous Case* of 1506 (supra), and of *Herlakenden's Case* (supra) is that it interprets the facts differently. There

is no hint that the court considers at all the intention of the parties. It is possible that we have here a premonition of the decision in *Wiltshear* v. *Cottrell* (post) in which attachment by gravity alone is held not to be annexation. It will be observed, too, that as half these cases were decided one way and half the other, on the same state of facts, the deductive procedure by the definitional route has brought us to the right conclusion in only fifty per cent of the cases.

During the eighteenth century the courts that followed these cases as precedents would come out on one side or the other according to whether the physical nexus were more or less intimate. This practically reduced the law on the subject to a nullity as the only question was one of physical fact. Even Lord Mansfield who begins to swing toward the test of intention as being the more significant, speaks of the "reason of the things," first, and the "intention," second; and by the "reason of the thing" he apparently means that they have become annexed to the inheritance. He calls them "accessories." *Lawton* v. *Salmon*, 2 H. Bl. 259 note (K. B. 1782).

As late as the latter half of the nineteenth century the English court decided that a heavy building, attached to the earth *only* by its *weight,* was, as a matter of definition, not legally annexed. The court said, "we are bound by the authorities to consider such an erection as a mere chattel." *Wiltshear* v. *Cottrell,* 1 E. & B., 2 Q. B. 674, (1853). This seems to establish, or confirm, the doctrine that attachment by gravity alone is not annexation. In the next year, however, the New York Court in *Snedeker* v. *Waring,* 10 N. Y. 170, 175, (1854), said, "a thing may be as firmly fixed to the land by gravitation as by clamps or cement." Thus far, the New York Court follows the English case in its grammatical method of interpretation of the word "annexation," but comes to a diametrically opposite conclusion, i. e., that a material *nexus,* is not necessary, if we have the invisible, intangible, force of gravitation to hold the chattel to the realty. Dean Pound has called attention to the fact that in the period succeeding our American Revolution the Anglophobia of the times sometimes got into our courts. Either because of his prejudice or because the court recognized that the Roman law would strengthen the decision, which was in direct conflict with that of the English Court in *Wiltshear* v. *Cottrell,* he quoted the rule from Labeo that the court had missed in the case of *Squier* v. *Mayer, supra.* Ulpian says that, *Labeo generaliter scribit ea, quae perpetui usus causa in aedificiis sunt, aedificii esse.* Dig. 19, 1, 17. This is the basis of the rule in modern French law relative to immovables by "destination." Cf. Code Napoleon, Section 524; also Bracton l. c. *supra.* Cf. also La. Civ. Code, Section 468.

It may be remarked in passing that, although the word "destination" of the French Code seems to cover the same ground as "intention" in English law, there are some important distinctions between them. Fixtures in English law can include only inanimate objects, while pigeons in their cotes, rabbits in their warrens, fish in fish ponds, may be *immeuble par destination.* Also in French law no one can make a fixture except the owner. See Code Napoleon, annotated by Blackwood Wright, Section 524, note (q).

This quotation from Labeo carries us back to the Golden Age of Roman law. Ulpian was one of that great coterie of philosophic jurists of the third century of the Christian era, and Labeo, whom he quotes, belonging to the Age of Augustus, was one "in whom a wider culture had instilled a love of general principles." The New York Court, in *Snedeker* v. *Waring,* by adopting the Roman law principle into our system, has brought our law into conformity with justice. By comparing the English case of *Wiltshear* v. *Cottrell* and the American case of *Snedeker* v. *Waring,* both belonging to the middle of the nineteenth century, with the cases of the sixteenth and seventeenth centuries, quoted above, it will be noted that the late cases come out just as the earlier ones, half right and half wrong, on exactly the same state of facts, so long as we reason deductively from the definition of "annexation," giving to the word in the one case the strictly literal meaning of annexation; i. e., a physical interlocking of the particles of matter, and in the other, the holding together by an intangible force. But just as soon as the court realizes that the real question to be decided is not the grammatical meaning of a word but what should be the rights of the parties under all the facts in the controversy, we arrive at conclusions in accordance with justice and fair dealing. The facts to be considered are in general:

(1). The physical relations of the things, i. e., the nature of the annexation (see all the old cases cited above).

(2). The intention of the parties; to be determined, (a) by the relations of the parties, whether landlord and tenant (the ordinary case); mortgagor and mortgagee, *Holland* v. *Hodgdon,* Exch. Ch. L. R. 7 C. P. 328 (1872); vendor and vendee, *Dustin* v. *Crosby,* 75 Me. 75, (1883); simple tort feasor or one acting with the purpose of condemning the property, *Justice* v. *Nesquehoning Valley Ry. Co.,* 87 Pa. 28 (1878). (b) by the nature of the thing, i. e., whether trade fixture or not, *Squire* & *Co.* v. *Portland,* 106 Me. 234, (1909). (c) by the custom of the locality. Gas stoves, realty, *Bank* v. *Realty, Corp.,* 137 App. Div. (N.Y.) 45, (1910); also the principal case. Gas stoves, personalty, *Hook* v. *Bolton,* 199 Mass. 244, (1908). The New York Court in deciding *Bank* v. *Realty Corp.* said, "It is a matter of common knowledge [in King's County] that heating and cooking form a part of the necessary and permanent equipment of a tenement house; that they are not ordinarily supplied by tenants, and there is evidence in the record of such custom." Following a similar course of reasoning, the Massachusetts court in *Hook* v. *Bolton, supra,* quotes from a previous Massachusetts' decision to the effect that "the tendency of the modern cases is to make this a question of the intention with which the machine was put in place. *Hopewell Mills* v. *Taunton Savings Bank,* 150 Mass. 522 (1890).

If the courts would only pay due heed to this suggestion of the Massachusetts court and forget the age-long grammatical litigation of the word "annexation," it would go far toward attaining just decisions in the majority of cases, and would free our reports of much useless lumber in the citation of ancient precedents. In every instance the question is not what the name of a legal concept *is,* but what can the parties legally do. What the courts have done is certainly law, and is more significant than what the courts have

said about the nature of a legal concept. By seeking first a definition and then proceeding by the formal grammatical method of the sixteenth century, we reach the goal of justice in about half the cases. If we ask first, what the rights of the litigant parties are, and then inquire, what are the facts of the controversy; including, *first,* the physical relations of the things, then, the character of the parties, the nature of the thing, and the custom of the locality, in order to satisfy the reasonable expectation and legal intention of the parties to the controversy, we increase the coincidence of law and justice by nearly a hundred per cent. In the interest of the efficient administration of justice, the modern scientific method seems to have decided advantages. J. H. D.

EFFECT OF AN AGREEMENT BY ONE PERSON TO SUPPLY ANOTHER'S "REQUIREMENTS" OF A GIVEN COMMODITY.—The cases show that the kind of agreement indicated by the heading of this note has become an established part of business usage. In normal times such an agreement is likely to be carried out to the entire satisfaction of both parties, without question, but, in a period of changing business conditions and abnormal price fluctuations such as we have witnessed during the last few years, nice questions of interpretation are likely to arise, as is well illustrated by the recent case of *Oscar Schlegel Mfg. Co.* v. *Peter Cooper's Glue Factory,* (1920) 179 N. Y. S. 271.

The defendant agreed to supply the plaintiff with its "requirements of 'Special BB' glue for the year 1916" at nine cents per pound, deliveries to be made as ordered by it. The plaintiff was a jobber and, as defendant well knew, bought only for re-sale to the trade. When it received an order for glue it sent a requisition to the defendant which filled it. Similar contracts had been entered into by the parties for each of the four years immediately preceding the contract in question. During that time the price of glue had remained stable, and plaintiff had secured orders for from sixty to seventy barrels, of 500 pounds each, per year. During the latter part of the year 1916, the price of glue went steadily upward from nine to twenty-five cents per pound. The plaintiff, evidently not averse to doing a little profiteering, having increased its sales force from eight to eighteen, pushed the sale of glue to such an extent—sometimes apparently by offering it at a substantial reduction from the prevailing market price—that it succeeded in getting orders amounting, for the year, to three hundred and forty barrels. Defendant shipped one hundred and thirty barrels but refused to supply the balance, and when sued, resisted a recovery on two grounds, viz., (1) that the agreement was not binding for want of mutuality. (2) that in any event the word "requirements," properly interpreted, meant simply that defendant was to supply glue to an amount substantially equivalent to what had been ordered by the plaintiff during the preceding year. Both points were resolved against the defendant by a divided court.

It seems quite obvious that in the proper interpretation of the word "requirements," as used in the agreement, is to be found the correct solution of both of the problems suggested by the defendant. According to the usual definition given by standard dictionaries the word may be used in either